

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

TERRY TOMLINSON)	
Claimant)	
VS.)	
)	
CUSTOM CAMPERS, INC.)	Docket No. 208,123
Respondent)	
)	
AND)	
)	
GALLAGHER WOODSMALL)	
Insurance Carrier)	
)	
AND)	
)	
KANSAS WORKERS COMPENSATION FUND)	

ORDER

The Kansas Workers Compensation Fund (Fund) appeals from an Award rendered by Administrative Law Judge John D. Clark on April 9, 1998.

APPEARANCES

Respondent and its insurance carrier appeared by their attorney, Christopher J. McCurdy of Wichita, Kansas. The Kansas Workers Compensation Fund appeared by its attorney, Garry L. Howard of Wichita, Kansas.

RECORD AND STIPULATIONS

The Appeals Board has reviewed the record and considered the stipulations listed in the Award.

ISSUES

Respondent and claimant have settled. The sole issue on appeal is whether the Fund should be responsible for all or any portion of the amount paid in the settlement.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Award by the Administrative Law Judge requires the Fund to pay 50 percent of the benefits. After reviewing the record and considering the arguments, the Appeals Board concludes that the Award should be affirmed.

Claimant suffered accidental injury arising out of and in the course of his employment on December 22, 1992. Under the law applicable at the time of claimant's accident, the Kansas Workers Compensation Act shifted liability for injuries to handicapped employees in cases where the employer knowingly employed or retained a handicapped

employee and that employee later suffered an injury which was caused or contributed to by the handicap. The Fund is liable for all of the benefits paid if the disability would not have occurred but for the preexisting impairment. If the disability would have occurred regardless of the preexisting impairment, but the resulting disability was contributed to by the preexisting impairment, the Fund is liable for the portion of the Award attributable to the preexisting impairment. K.S.A. 1992 Supp. 44-567.

The Board finds claimant was a handicapped employee and the respondent employed and/or retained him with knowledge of that handicap. Mr. Jerry W. Whitworth, president of the respondent company, testified that he could, from observing claimant, tell that he was physically handicapped. Claimant's elbows protruded out and he walked with a limp, and stood pretty much stooped over from the waist. In addition, Mr. Whitworth was aware, on advice from Mr. Ron Horn, claimant's father-in-law, that claimant had a degenerative disc disease.

The Board also agrees with the conclusion by the Administrative Law Judge that claimant's preexisting impairment contributed to the disability resulting from the compensable work-related injury. The only physician who testified was Dr. Verdon W. Parham. He testified that in his opinion, this was not a "but for" circumstance but that the preexisting impairment contributed 50 percent to the injuries claimant suffered as a result of his work-related accident. On the basis of his testimony, the Administrative Law Judge awarded 50 percent of the benefits to be paid by the Kansas Workers Compensation Fund. The Appeals Board agrees with and affirms that decision.

The Appeals Board adopts and incorporates here the findings of fact and conclusions of law stated in the Award.

AWARD

WHEREFORE, the Appeals Board finds that the Award by Administrative Law Judge John D. Clark, dated April 9, 1998, should be, and the same is hereby, affirmed.

IT IS SO ORDERED.

Dated this ____ day of July 1998.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Christopher J. McCurdy, Wichita, KS
Garry L. Howard, Wichita, KS
John D. Clark, Administrative Law Judge
Philip S. Harness, Director